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16

17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 TRAFFICSCHOOL.COM, INC., a  
California corporation; DRIVERS ED  
20 DIRECT, LLC, a California limited  
liability company,

21 Plaintiffs,

22 v.  
23

24 EDRIVER, INC., ONLINE GURU,  
INC., FIND MY SPECIALIST, INC.,  
25 and SERIOUSNET, INC., California  
corporations; RAVI K. LAHOTI, RAJ  
26 LAHOTI, individuals,

27 Defendants.  
28

CASE NO. CV 06-7561 PA (CWx)

The Honorable Percy Anderson

**JOINT STATUS REPORT**

**PLAINTIFFS' PORTION OF JOINT STATUS REPORT**

**I. SUMMARY OF PLAINTIFFS' POSITION**

The Ninth Circuit's July 28, 2011 Opinion ("Mandate") comes *over three years after* the Court issued its June 4, 2008 Findings of Fact and Conclusions of Law and Order Finding Defendants Liable for False Advertising ("Findings", Docket # 210). Much has taken place since those Findings and the August 26, 2008 Judgment and Permanent Injunction ("Injunction"). An accurate and fair reading of the Mandate dictates that on remand, this Court must now *first* consider relevant *new* evidence before it decides how to modify the Injunction – evidence that is mostly, but not entirely, currently in Defendants' sole possession. That new evidence includes:

- (1) all relevant changes to DMV.org's website content and Defendants' marketing practices (and when they occurred); and
- (2) the dissipation (or lack thereof) of public confusion.

Not surprisingly, Defendants refused to voluntarily disclose this evidence to Defendants, hoping instead that this Court will capriciously eliminate the splash screen remedy based solely on Defendants' most recent changes to the DMV.org website (i.e., changes made *after* the Mandate issued).<sup>1</sup> This Court should reject any proposal to eliminate the splash screen based solely on Defendants' self-serving (and unchallenged) pronouncements of "no continuing deception". Such a proposal is inconsistent with both the letter and spirit of the Mandate. [See, Section II., *infra*.]

Indeed, Plaintiffs are aware of not only continuing *lingering public confusion* – which Defendants also recently admitted – but of *continuing deception* by Defendants in their DMV.org – related marketing practices.<sup>2</sup> As explained herein, this evidence of

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<sup>1</sup> In the meet and confer process, Defendants suggested that they would be proposing the elimination of the splash screen in light of their recent design of disclaimers as currently displayed on DMV.org. *See*, Hamilton Decl., ¶ 4, Ex. D.

<sup>2</sup> *See* Hamilton Decl., Exhs. C1, N – R.

1 continued deception and confusion is itself sufficient, according to the Mandate, to  
2 justify the continued requirement of the splash screen. [See, Section III., *infra.*]

3 However, Plaintiffs welcome modification of the current Injunction to clarify and  
4 rectify Defendants' continued deliberate efforts to hide the disclaimer and to confuse  
5 consumers, while still providing a narrowly tailored injunction that does not prohibit  
6 future truthful advertising, and otherwise addresses all of the Ninth Circuit's First  
7 Amendment concerns. Plaintiffs' suggestions for such a modified Injunction are  
8 discussed herein. [See, Section IV., *infra.*]

9 Plaintiffs are cognizant of the Mandate that the Court must specify the conditions  
10 that Defendants should satisfy in order to remove the splash screen in the future, but  
11 those conditions are best determined after further factual findings are made based on  
12 the new evidence. Alternatively, Plaintiffs herein propose that the Court borrow from  
13 the Federal Trade Commission (FTC), which has developed laws and disclosure  
14 guidelines that are directly analogous to the First Amendment rule of the "least  
15 restrictive alternative" remedy for commercial speech, and thus would satisfy the Ninth  
16 Circuit's First Amendment concerns. In addition, Plaintiffs suggest that the Court  
17 appoint a Special Master at Defendants' expense to oversee and independently evaluate  
18 the continued need for the splash screen on a periodic basis. [See, Section V., *infra.*]

19 Plaintiffs are emphatic that no modified permanent injunction should be issued  
20 based solely on self-serving and unchallenged declarations or other evidence submitted  
21 by Defendants, who have already been found to be willful false advertisers, and as we  
22 will illustrate below, continue to be willful false advertisers. However, Plaintiffs  
23 welcome a status conference with the Court, including setting the scope and procedures  
24 for evidence evaluation, and/or the issuance of an order for additional briefing.  
25 Plaintiffs would also be amenable to participating in a Court ordered settlement  
26 conference to potentially resolve the issues on remand and then present a post-  
27 settlement proposal for resolution of the injunction and attorney's fees issue to the  
28 Court. [See, Section VI., *infra.*]

## 1 II. THE *CORRECT* INTERPRETATION OF THE MANDATE AND NEED 2 FOR ADDITIONAL FACT FINDINGS

3 It is axiomatic that on remand the Court must be guided by the Mandate and  
4 follow it as closely as possible. The Ninth Circuit *affirmed* that this Court did not abuse  
5 its discretion “when it concluded that the splash screen was the optimal means of  
6 correcting defendants’ false advertising” (*Opinion* at 9749) and remanded only because  
7 it believed that this Court may not “have considered that its injunction would  
8 permanently and unnecessarily burden access to DMV.org’s First Amendment-  
9 protected content.” (*Opinion* at 9750). It is critical for this Court to reject any incorrect  
10 interpretation of the Mandate, which Defendants appear to be intent on advancing.<sup>3</sup>  
11 Indeed, Defendants suggest that the Court need only look at the most recent version of  
12 the DMV.org website and simply enjoin any deceptive marketing or misleading  
13 statements on DMV.org, without any further fact finding. This position squarely  
14 violates the Mandate, which requires the Court to specifically consider the relevant  
15 new evidence which concerns ongoing confusion and deception since the Injunction.

16 Beginning with the end in mind, the Ninth Circuit’s *specific remand instructions*  
17 to the Court are as follows:

18 “On remand, the district court shall:

19 [1.] “[R]econsider the *duration* of the splash screen in  
20 light of any intervening changes in the website’s  
21 content and marketing practices”;

22 [2.] “Reconsider the *duration* of the splash screen in light  
23

24 <sup>3</sup> Defendants hope that this Court will erroneously interpret the Mandate as, in essence,  
25 a reversal of the splash screen and not allow Plaintiffs a chance to challenge  
26 Defendants’ purported evidence. This approach would render meaningless the Ninth  
27 Circuit’s pronouncement that “the injunction confers substantial benefits on the public”  
28 and “conferred significant benefits on third parties and also vindicated plaintiffs’ right  
to a ‘market free of false advertising.’ [citation omitted.]” *Opinion* at 9754

1                   of ...the *dissipation of the deception* resulting from  
 2                   past practices.” *Opinion* at 9751. (Emphasis added).

3           In other words, to resolve the “duration” issue, the Court must first consider new  
 4 evidence [i.e., (1) any intervening changes in the (a) website’s content and (b)  
 5 marketing practices and (2) the dissipation, if any, of consumer confusion.].

6           Next, the Court instructs as follows:

7                   “If the district court continues to require the splash screen, it  
 8                   shall:

9                   [1.] Explain the continuing justification for  
 10                   burdening the website’s protected content and

11                   [2.] [W]hat conditions defendants must satisfy in  
 12                   order to remove the splash screen in the future.”

13                   “*In the alternative*, or in addition, the court may:

14                   [1.] [P]ermanently enjoin defendants from engaging  
 15                   in deceptive marketing or placing misleading  
 16                   statements on DMV.org. See *U-Haul II*, 793 F.2d at  
 17                   1043 (modifying injunction to prohibit only false and  
 18                   misleading advertising).”

19           Thus, the Mandate advises that this Court, after considering the new evidence,  
 20 has the option of continuing to require the splash screen (with explained justifications  
 21 and guidance to Defendants on when it would no longer be necessary), *and/or* to  
 22 permanently enjoin any deceptive marketing or misleading statements.

23           These instructions should be considered in the overall context and construct of  
 24 the Ninth Circuit’s entire discussion of the injunction and specifically, the splash screen  
 25 remedy. In first upholding this Court’s issuance the splash screen, the Ninth Circuit  
 26 noted “that the splash screen was necessary to:

27                   (1) ‘remedy any confusion that consumers have already developed before  
 28                   visiting DMV.ORG for the first time,’

- 1 (2) ‘remedy the public interest concerns associated with [confused visitors’]  
 2 transfer of sensitive information to Defendants,’ and  
 3 (3) prevent confusion among DMV.ORG’s consumers.’” *Opinion* at 9748-  
 4 9749.

5 The Ninth Circuit then specifically *rejected* Defendants’ argument on appeal that  
 6 “the splash screen doesn’t effectuate these stated goals,” stating that the “self-serving”  
 7 declaration submitted by Defendants “doesn’t prove that the splash screen is ineffective  
 8 in this respect, and says nothing about whether the alternative disclaimers serve the  
 9 other two interests identified by the district court.” *Id.* In affirming the remedy, the  
 10 Ninth Circuit stated: “Defendants haven’t carried their “heavy burden” of showing that  
 11 their alternative disclaimers reduce DMV.org’s likelihood of confusing consumers.  
 12 [citations omitted.]” *Id.*

13 Turning next to First Amendment concerns, the Ninth Circuit stated that because  
 14 DMV.org’s “informational content is commingled with truthful commercial speech,  
 15 which is entitled to significant First Amendment protection”, the Court was “required to  
 16 tailor the injunction so as to burden no more protected speech than necessary [citations  
 17 omitted.]” *Opinion* at 9750. While reversing nothing related to the issuance of the  
 18 Injunction, the Ninth Circuit merely communicated a concern that the Court *may* not  
 19 have fully considered First Amendment implications. Thus, the Ninth Circuit is inviting  
 20 the Court to further evaluate two considerations.

21 First, the Ninth Circuit raised the issue of intervening changes to website  
 22 content, stating that the “district court premised its injunction on its findings that  
 23 defendants’ “search engine marketing” and “non-sponsored natural listings, *including*  
 24 *the DMV.ORG domain name*,” caused consumers to be confused even before they  
 25 viewed DMV.org’s content” and “identified specific misleading statements on the  
 26 website”. It noted that the “splash screen is justified to remedy the harm caused by such  
 27 practices so long as they continue.” *Opinion* at 9751 (emphasis added).

28 Second, the Ninth Circuit raised the issue of lingering confusion: “The splash

1 screen is also justified so long as it helps to remedy lingering confusion caused by  
 2 defendants' past deception." "But the splash screen will continue to burden DMV.org's  
 3 protected content, even if all remaining harm has dissipated. At that point, the  
 4 injunction will burden protected speech without justification, thus burdening more  
 5 speech than necessary.[citations omitted.]

6 In sum, the requirement that the Court on remand reconsider the "duration" of  
 7 the splash screen *in light of* intervening changes in the (a) website's content and (b)  
 8 marketing practices", and (c) ongoing confusion is tied to the expressed First  
 9 Amendment concerns about the permanency of the injunction. *Opinion* at 9751.  
 10 Accordingly, it is inescapable that the Court must first examine the intervening factual  
 11 record before it decides to make any changes to the Injunction, including eliminating  
 12 the splash screen.

13 Moreover, the efficacy and functionality of Defendants' splash screen should  
 14 also be revaluated in light of the Mandate. Citing to two factual predicates that impose  
 15 "burdens on protected speech [that] are, under the current injunction, permanent" the  
 16 Ninth Circuit voiced concern that the "splash screen forces potential visitors to take an  
 17 additional navigational step, deterring some visitors from entering the website  
 18 altogether" and "precludes defendants from tailoring DMV.org's landing page to make  
 19 it welcoming to visitors, and interferes with the operation of search engines, making it  
 20 more difficult for consumers to find the website and its protected content." The Ninth  
 21 Circuit's footnotes 5 and 6 reference certain evidence that was unrebutted.<sup>4</sup>

22 First, addressing Footnote 5 of the Opinion related to the splash screen driving  
 23 away up to 25% of potential visitors, the Ninth Circuit stated: "Defendants' website  
 24 \_\_\_\_\_

25 <sup>4</sup> All of this evidence, however, was submitted after the trial record closed in this case  
 26 on January 24, 2008, and after this Court issued its Findings on June 4, 2008. T  
 27 Plaintiffs objected to this evidence. [Docket #s 212-214.] However, a close examination  
 28 of that evidence actually supports Plaintiffs' position on remand.



1 usability expert submitted a declaration stating that splash screens typically drive away  
 2 up to a quarter of potential site visitors. Plaintiffs cite nothing to rebut this evidence.”  
 3 This "usability expert" is Bruce Tognazzini, whose declaration was submitted in  
 4 support of Defendants’ objection to the proposed Injunction. [Hamilton Decl., Ex. BB.]  
 5 In paragraph 11 of his declaration he states: "Websites with initial splash pages  
 6 typically lose 25% of their visitors at the splash page." In making these statements he  
 7 relies on a "guilt by association" theory (i.e., splash page associated w/ porno, alcohol  
 8 and gambling) and on third party studies conducted in 1994 and a study he conducted in  
 9 1998. (see para. 13-17). Again, Plaintiffs never had the opportunity to rebut this  
 10 evidence because this evidence was never part of the trial record. Mr. Tognazzini was  
 11 never identified as a witness, and Plaintiffs never had the opportunity to take his  
 12 deposition or cross-examine him. Moreover, the splash screen at issue here is unrelated  
 13 to any pornography, alcohol, or gambling website, and there has been no evidence  
 14 presented that the splash screen as implemented actually drives away 25% of visitors  
 15 from the DMV.org website.

16 Second, addressing Footnote 6 of the Opinion related to the splash screen’s  
 17 searchability and ranking, the Ninth Circuit stated: “Defendants introduced unrebutted  
 18 evidence that splash screens commonly interfere with the automated 'spiders' that  
 19 search engines deploy to 'crawl' the Internet and compile the indexes of web pages they  
 20 use to determine every page's search ranking. And splash screens themselves don't  
 21 have high search rankings: Search engines commonly base these rankings on the web  
 22 page's content and the number of other pages linking to it, and splash screens lack both  
 23 content and links." This "unrebutted evidence" is the Declaration of David Gray, which  
 24 was submitted by Defendants in support of their Opposition to the Motion for  
 25 Contempt. [Hamilton Decl., Ex. CC.] According to Gray, "a splash page, if not  
 26 implemented properly will prevent users from finding DMV.ORG's content through the  
 27 use of search engines". He cites to various web articles (hearsay) about this "well  
 28 recognized" problem with splash pages in general. Plaintiffs never had the opportunity



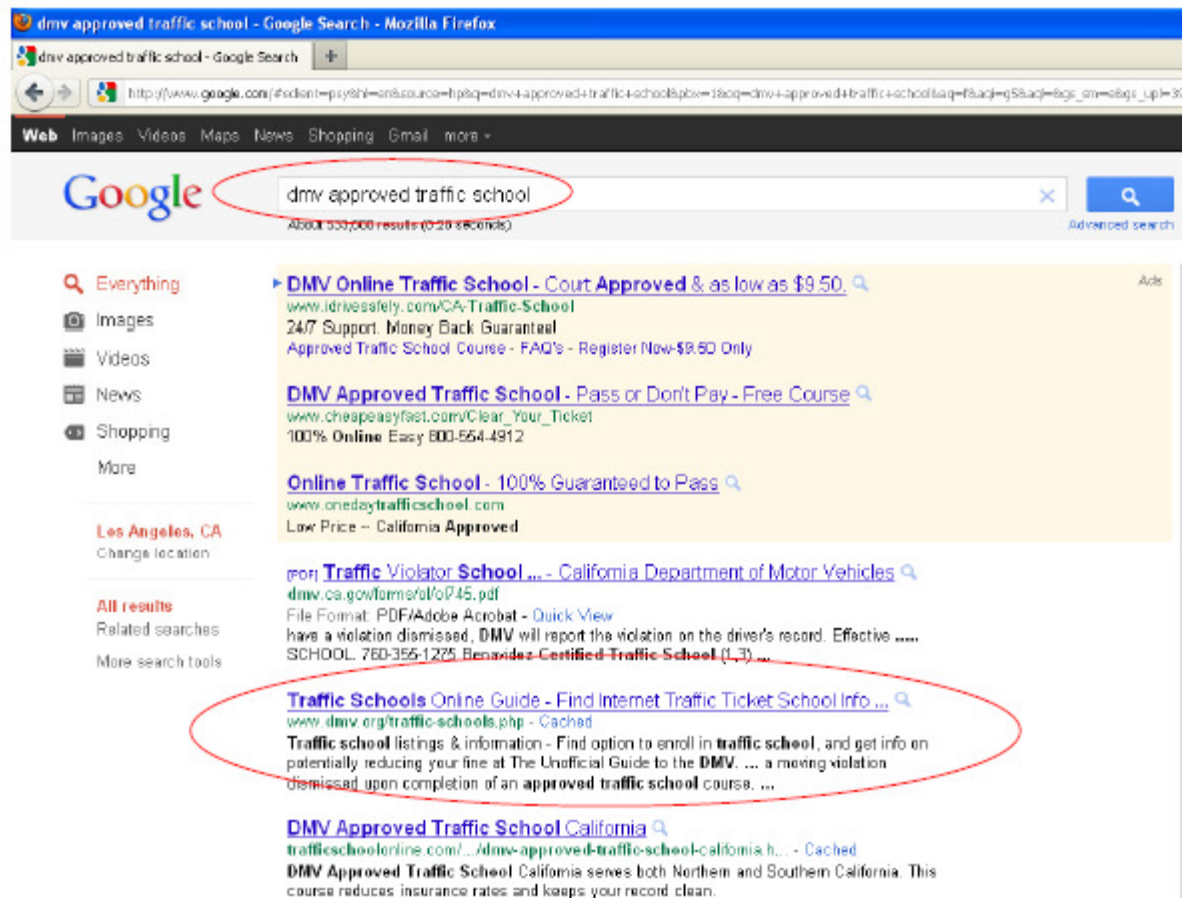
1 to rebut this evidence and/or cross-examine Gray because, this evidence was not part of  
2 the trial record, and Gray was never identified as a witness at trial.

3 However, David Gray's declaration also explains that Defendants have already  
4 implemented a program so that DMV.ORG's splash page does *not* adversely affect the  
5 website's searchability and resulting search ranking. This addresses the Ninth Circuit's  
6 concern about interference with searchability, and confirms that the splash screen does  
7 *not* interfere with the operation of search engines. According to Gray:

- 8 • "Online Guru had to deploy the splash page in a manner that would still  
9 allow users to search for and find DMV.ORG's information through search  
10 engines." [Para. 11]
- 11 • "To cope with these issues, Online Guru employed widely used and  
12 accepted technologies including JavaScript and Cookies." [Para. 13]
- 13 • "JavaScript was chosen as a solution because it assures that the splash  
14 page is not displayed to search engines." [Para. 14]
- 15 • "To assure the continued existence of DMV.ORG it was imperative for us  
16 to be able to do the following: display the splash page to users, while not  
17 displaying the splash page to search engines." [Para. 14]
- 18 • "Based on our internal discussions and planning as set forth above, it is my  
19 belief that the implementation of a splash page through the use of JavaScript and  
20 cookies was the best solution available that would allow DMV.ORG to still be  
21 accessible to search engines. Furthermore, this was determined to be the best  
22 solution to reach the largest spectrum of users given the widespread use and  
23 acceptance of these technologies as set forth above." [Para. 22]
- 24 • "[W]e spent hundreds of hours analyzing our options, seeking an option  
25 which would both meet the mandate of this Court but not also destroy the  
26 accessibility of the content of the site."

27 These statements support Plaintiffs' position that the splash screen does not (and  
28 would not) unnecessarily burden access to any First Amendment protected content.

1 Despite the splash screen, the website's content is still accessible to search engines,  
 2 allowing users to search and find the website and read its content. In fact, a simple  
 3 Google search for "dmv approved traffic schools" shows that DMV.ORG (with the  
 4 highlighted content displayed) is in the SECOND NATURAL search result, right after  
 5 the government website (dmv.ca.gov).



21 See, Hamilton Decl., at Ex. L; See also results from searches of “DMV”, “DMV  
 22 traffic ticket information.”, Exhs. K and M.

### 23 **III. JUSTIFICATIONS FOR THE CONTINUED IMPOSITION OF A** 24 **SPLASH SCREEN INJUNCTION**

25 Plaintiffs are aware of continuing *lingering public confusion* – which Defendants  
 26 have admitted – and *continuing deception* by Defendants in their DMV.org related  
 27 marketing practices. As explained herein, this evidence of continued deception and  
 28 confusion is itself sufficient, according to the Mandate, to justify the continued

1 requirement of the splash screen.

2 **A. Ongoing Confusion**

3 Defendants have recently admitted that confusion is still ongoing. [Hamilton  
4 Decl., Exhs. D and C-1]

5 Defendants are aware of their document preservation obligations, and have preserved all  
6 relevant electronic data. However, on dmv.org's Facebook page, Defendants have removed from  
7 public view approximately 40 postings which they believed were inappropriate for a variety of  
8 reasons, including comments that are harmful, offensive, or perpetuate consumer confusion. For  
9 example, complaints that were apparently addressed to a Department of Motor Vehicles were  
removed by Defendants to *prevent further* confusion and to discourage other users from posting in  
these inappropriate manners.

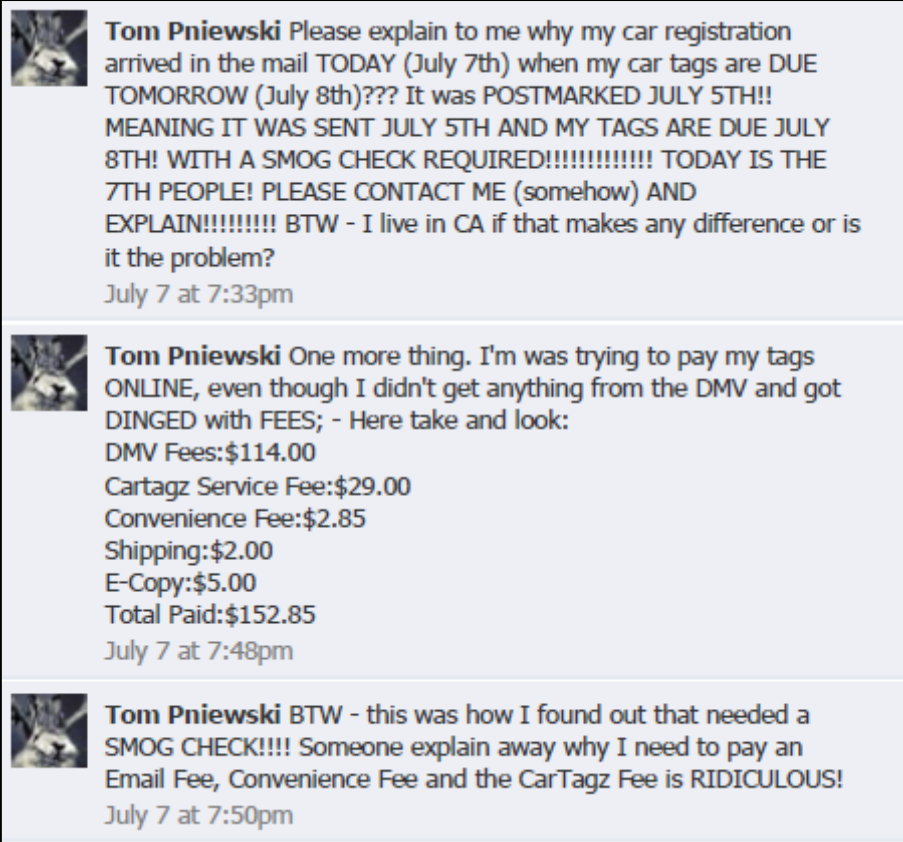
10  
11 I don't think our position is accurately stated in the letter. We believe there is still some consumer confusion, but at this  
12 time we do not agree that it results from past or current deception, and we believe there is no evidence of continuing  
deception. As such, we do not believe discovery in the method and manner that is proposed would be appropriate or  
necessary.

13  
14 Thus, the splash screen is justified to continue to help remedy this continued  
15 confusion caused by Defendants' past and ongoing deception.

16 **B. Continued Deceptive Practices**

17 Since the Injunction, Defendants have engaged in additional marketing practices  
18 that are intentionally deceptive. Specifically, screen shots from the current DMV.org  
19 website, attached to the Hamilton Decl., Exhs. S – X1] detail the following deceptive  
20 practice: In using a disclaimer before consumers email the site, Defendants purport to  
21 direct the consumer to their local DMV and "Online Services" for that local DMV.  
22 However, the consumer is actually being directed to DMV.org's own affiliated services.  
23 This practice has resulted in consumer deception, which has caused at least one (but  
24 likely thousands of other consumers) to pay fees to DMV.org (and its affiliates) under  
25 the mistaken belief that these were *required fees* by their local DMV office. [*Id.*, Ex.  
26 O]. Indeed, since the Injunction, Defendants have created new marketing for DMV.org

1 through its Facebook page. Consumer comments to the DMV.org Facebook page  
 2 evidence confusion, as admitted by Defendants (see *supra*)<sup>5</sup> :



26 <sup>5</sup>As noted in the Hamilton Decl. at ¶¶ 15 - 20, Defendants recently deleted certain  
 27 evidence showing consumer confusion related to this practice. Luckily, Plaintiffs  
 28 saved screen shots of this evidence.

1 Additional deceptive practices continue and there are likely others that Plaintiffs  
 2 will find after additional investigation and discovery. See, Hamilton Decl., Exhs. P-1  
 3 and X2 (marketing of DMV.ORG at the website [www.UnitedStates.org](http://www.UnitedStates.org) listing it  
 4 alongside other government websites).

5 **C. New Visitors to DMV.org**

6 In addition to the above, the continued imposition of the splash screen is justified  
 7 because there are brand new visitors to DMV.org every year, including new teenager  
 8 drivers that visit the site every year. Consider the following:

9 • According to a 2003 DMV study, there are approximately 20,000 new  
 10 provisional licenses issues monthly. This includes all drivers under the age of 18.  
 11 See, [http://dmv.ca.gov/about/profile/rd/r\\_d\\_report/Section%201/205-](http://dmv.ca.gov/about/profile/rd/r_d_report/Section%201/205-GDL%20Report.pdf)  
 12 [GDL%20Report.pdf](http://dmv.ca.gov/about/profile/rd/r_d_report/Section%201/205-GDL%20Report.pdf). [Hamilton Decl., ¶ 37.]

13 • According to the US DOT, FHA (United States Department of  
 14 Transportation, Federal Highway Administration) report for 2009, there were 236,358  
 15 licensed drivers aged 16 & 17 in CA. The average age according to the CA DMV  
 16 study noted above for a provisional license being issued is 16 ½. The same report  
 17 showed there were 3,836,929 licensed drivers aged <16, 16, 17 in the entire United  
 18 States. See, <http://www.fhwa.dot.gov/policyinformation/statistics/2009/dl22.cfm>. *Id.* at  
 19 ¶ 38.

20 These numbers are annual numbers that likely stay very consistent so the  
 21 universe of new teen drivers looking to get licenses in California and the United States  
 22 is likely consistent with these figures.

23 **D. Defendants' Proposed Disclaimers and the Inherent Deception of the**  
 24 **DMV.org Domain Name**

25 A review of this Court's prior relevant Findings defeats Defendants anticipated  
 26 argument that their current "disclaimers are sufficient":

- 27 1. "Despite being aware of consumer confusion, Defendants did nothing to rectify  
 28 the problem until the filing of this lawsuit. Indeed, Defendant Raj Lahoti testified



1 that he does not view the confusion as a problem. [evidence citation omitted.]”

2 Docket #210 at 21.

3 2. “The Court finds that Defendants’ deception was willful.” *Id.*

4 3. “The Court further finds that none of the steps Defendants have taken since the  
5 filing of this action alter this conclusion.” *Id.*

6 The third finding relates to the Court’s previous recitation of “Post-Lawsuit  
7 Changes to DMV.ORG” at page 16 of the Findings, in which the various changes made  
8 by Defendants were discussed, including that “Defendants added a description in large  
9 font stating “The Unofficial Online Guide to the DMV” to some, but not all, webpages  
10 on DMV.ORG. [evidence citation omitted; emphasis added].”

11 Why are these prior findings relevant? Because Defendants now seek to  
12 persuade the Court that their most recently modified website which includes  
13 disclaimers using the “Unofficial” phrase are sufficient to warrant abandonment of the  
14 splash screen. However, this ignores that “Unofficial” disclaimers were previously used  
15 by Defendants and per Defendants’ own admission, were ineffective to prevent  
16 confusion. This Court specifically found the following: “However, as the many  
17 examples listed above that post-date the filing of this lawsuit show, and as Defendants  
18 admit, members of the public continue to be confused in spite of these changes.” *Id.*

19 Indeed, Plaintiffs believe that the DMV.org domain name is inherently  
20 misleading and Defendants’ proposed disclaimers (as proposed as part of the meet and  
21 confer process) are insufficient to cure this, thus further justifying the continued need  
22 for the splash screen. Professor McCarthy’s treatise is worth quoting as he addresses  
23 the exact issue:

24 “Defendant's disclaimer stating that it is not connected with  
25 plaintiff may or may not prevent a finding of likely  
26 confusion, depending upon the facts.[citations in footnote  
27 omitted.] However, many courts have held that a disclaimer  
28 does not serve to cure an otherwise clear case of likely  
confusion. [citations in footnote omitted.] Consumer studies  
indicate that disclaimers are ineffective in curing customer



1 confusion over similar marks. [citations in footnote omitted].  
 2 In fact, in some instances, the use of a disclaimer can serve  
 3 to aggravate, not alleviate, confusion over brands.[<sup>6</sup>]

4 \* \* \*

5 Clearly, use of a relatively inconspicuous disclaimer will not  
 6 prevent likely confusion.[citing to University of Georgia  
 7 Athletic Ass'n v. Laite, 756 F.2d 1535, 225 U.S.P.Q. 1122  
 8 (11th Cir. 1985); Weight Watchers Int'l, Inc. v. Stouffer  
 9 Corp., 744 F. Supp. 1259, 19 U.S.P.Q.2d 1321, 1334  
 10 (S.D.N.Y. 1990) ("Because of its location and size, the  
 11 disclaimer does not effectively eliminate the misleading  
 12 impression conveyed in the ad's large headline.").

13 \* \* \*

14 In the author's view, the problem with a disclaimer in a case  
 15 of clear infringement is that the consumer is then faced with  
 16 two contradictory messages: the infringing trademark says  
 17 that this product comes from source Alpha - the disclaimer  
 18 says we have no connection with Alpha. Imagine the  
 19 infringing product greeting the potential purchaser with a  
 20 smile and saying: "Hello! I'm from KODAK, but of course I  
 21 have no connection with KODAK!" Such conflicting  
 22 messages put together can sometimes create a label or

---

23 <sup>6</sup> Citing to cases, See, e.g., *E. & J. Gallo Winery v. Gallo Cattle Co.*, 12 U.S.P.Q.2d  
 24 1657, 1989 WL 159628 (E.D. Cal. 1989), modified, aff'd, 955 F.2d 1327, 21  
 25 U.S.P.Q.2d 1824 (9th Cir. 1992), amended, 967 F.2d 1280 (9th Cir. 1992) (Survey  
 26 results with and without a prominent disclaimer of connection showed that a disclaimer  
 27 had very little impact in reducing the level of confusion. In one market survey, the  
 28 confusion level was even slightly higher with a disclaimer than without. The court  
 granted a near absolute injunction against use of a personal name.); *Pebble Beach Co.*  
*v. Tour 18 I, Ltd.*, 942 F. Supp. 1513, 1551 (S.D. Tex. 1996), aff'd on point, 155 F.3d  
 526, 48 U.S.P.Q.2d 1065 (5th Cir. 1998) ("inconspicuous disclaimers" were not  
 sufficient to eliminate golfers' confusion that defendant golf course look-alike holes  
 were sponsored or approved by plaintiff golf courses); *Cartier, Inc. v. Deziner*  
*Wholesale, L.L.C.*, 55 U.S.P.Q.2d 1131, 2000 WL 347171 (S.D. N.Y. 2000) (disclaimer  
 in print that is 16 times smaller than defendant's use of plaintiff's trademark is not  
 effective to offset likely confusion).

1 advertisement that is just as or even more confusing and  
 2 deceptive than the infringing mark alone. [citing to See  
 3 Novartis Consumer Health, Inc. v. Johnson & Johnson-  
 4 Merck Consumer Pharmaceuticals Co., 290 F.3d 578, 62  
 5 U.S.P.Q.2d 1757, 1770 (3d Cir. 2002) ("We do not believe  
 6 that a disclaimer can rectify a product name that necessarily  
 7 conveys a false message to the consumer.")

8 4 McCarthy on Trademarks and Unfair Competition § 23:51 (4th ed.) (Emphasis  
 9 added).

10 "Moreover, the academic research on disclosures and disclaimers reveals that  
 11 they are rarely effective when the main message of an ad is confusing or misleading.  
 12 See, Rebecca Tushnet, *Trademark Law as Commercial Speech Regulations*,  
 13 58S.C.L.Rev. 737-756, 742 (2007)(citing to multiple sources, including certain FTC  
 14 comments that "[T]est results suggest that consumers may misconstrue some qualifying  
 15 disclosures as part of the seller's promotional message, thereby reinforcing rather than  
 16 limiting the claim.").

17 Even Judge Kozinski agrees that some domain names have the inherent ability to  
 18 mislead. In *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1177-1178 (9th  
 19 Cir. Cal. 2010), another Lanham act case dealing with domain names, the Ninth Circuit  
 20 in an opinion written by Judge Kozinski remanded an injunction that ordered the alleged  
 21 infringers to cease using the domain names buy-a-lexus.com or buyorleaselexus.com or  
 22 to use the trademark Lexus trademark in any other domain name. Judge Kozinski found  
 23 the injunction too broad, but of note, distinguished the domains from domains like  
 24 DMV.org, stating:

25 The district court reasoned that the fact that an internet  
 26 domain contains a trademark will "generally" suggest  
 27 sponsorship or endorsement by the trademark holder. When  
 28 a domain name consists only of the trademark followed by  
 .com, or some other suffix like .org or .net, it will typically  
 suggest sponsorship or endorsement by the trademark holder.  
 [citations omitted] n4 This is because "[a] customer who is  
 unsure about a company's domain name will often guess that

1 the domain name is also the company's name." Id. [citations  
 2 omitted]. If customers type in trademark.com and find the  
 3 site occupied by someone other than the trademark holder,  
 4 they may well believe it is the trademark holder, despite  
 5 contrary evidence on the website itself. Alternatively, they  
 6 may become discouraged and give up looking for the  
 trademark holder's official site, believing perhaps that such a  
 website doesn't exist. [citation omitted]

7 n4 Of course, not every trademark.com domain name is  
 8 likely to cause consumer confusion. [citation omitted] For  
 9 instance, we observed in Interstellar Starship that an apple  
 10 orchard could operate at the website apple.com without  
 11 risking confusion with Apple Computers, in light of the vast  
 12 difference between their products. [citation omitted] "If,  
 13 however, the apple grower . . . competed directly with Apple  
 14 Computer by selling computers, initial interest confusion  
 probably would result," as the apple grower would be using  
 the apple.com domain to appropriate the goodwill Apple  
 Computer had developed in its trademark. [citation omitted]

15 When a website deals in goods or services related to a  
 16 trademarked brand, as in this case, it is much closer to the  
 17 second example, where apple.com competes with Apple  
 18 Computers. If a company that repaired iPods, iPads and  
 19 iPhones were to set up at apple.com, for instance, consumers  
 20 would naturally assume that the company was sponsored or  
 21 endorsed by Apple (or, more likely, that it was Apple).  
 22 Where a site is used to sell goods or services related to the  
 trademarked brand, a trademark.com domain will therefore  
 suggest sponsorship or endorsement and will not generally  
 be nominative fair use.

23 Like the examples cited by Judge Kozinski, DMV.org is an inherently misleading  
 24 domain name and thus the splash screen is justified so long as Defendants continue to  
 25 use that name.

26  
 27 // /

**IV. THE PLAINTIFF'S PROPOSED SUGGESTIONS FOR A MODIFIED PERMANENT INJUNCTION THAT IS FULLY CONSISTENT WITH THE MANDATE AND FIRST AMENDMENT JURISPRUDENCE**

First, Plaintiffs propose that the Injunction be modified to clarify that the wording in the disclaimer must be truly prominent. Since the Injunction issued, Defendants have failed to comply with it. Plaintiffs are not the only ones that think so. Two independent bloggers have commented that Defendants appear to be hiding the disclaimer:

combat false advertising, but with conditions.) [You can look at the splash screen the district court imposed either in the Appendix to the opinion or here. I will say that the "Disclaimer" seems deliberately hidden, at the top of the page (where it's easily ignored given the placement of the click-through. I might well not have even seen it if I wasn't actively looking for it.)]

There is a potential bright spot, I suppose: the [current splash screen](#) is pretty bad (I would infer deliberately so).



Defendants have removed "Unofficial Guide to the DMV" from their license plate logo. The disclaimer runs at the very top, a couple of pixels away from the top of

the browser window, in grey rather than black text (a nearly transparent tactic, pun intended!), not near the action invitation to click to continue, and not near the dmv.org logo, both of which are far more prominent to the eye. This placement clearly flunks the [FTC's guidelines for online disclosures](#), and defendants who already managed to mis-implement disclosures (of which more below) should not get the benefit of the doubt in this area. On remand, I sincerely hope that the revised remedy, whether splash

(Hamilton Decl., Exhs. Y and Z).

Moreover, Defendants have repeatedly changed the DMV.org logo on the splash screen and the look of the splash screen, including: (i) delaying the disclaimer text, (ii) presenting the delayed disclaimer text in faint grey font that blends with the toolbar browser, (iii) using font that is smaller than the logo, and (iv) making changes to the logo, going from “unofficial guide” to “dmv made simple” and now back again to “unofficial.” (Hamilton Decl., ¶¶ 7-11). Even the Court recognized that the Injunction should be modified to clarify the requirements about the disclaimer text. The Court previously stated: “Ordinarily, the Court might modify paragraph (f) of the injunction to require that the lettering in paragraph (c) appear larger than any lettering used in the DMV.ORG logo, without specifying the size of the language in paragraph (c). However, the injunction is currently on appeal, and therefore the Court declines to modify the injunction in the absence of a stipulation from the parties.” Docket # 290, Ex. DD to Hamilton Decl.

Second, to address the Ninth Circuit’s comment that the splash screen “precludes defendants from tailoring DMV.org’s landing page to make it welcoming to visitors, and interferes with the operation of search engine,”<sup>7</sup> Plaintiffs propose that the Injunction be modified so that the splash screen appear after the user first views the landing page but before the user is able to navigate in the site,<sup>8</sup> and to clarify that the splash screen may be designed to not interfere with the operation of search engines (as is the case already, see *supra*).

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<sup>7</sup> Again, while Plaintiffs do not challenge the evidence submitted by Defendants that some splash screen do interfere with search engines, Plaintiffs submit that here, Defendants have admittedly designed the splash screen so as not to interfere with the search engines.

<sup>8</sup> While the following link displays neither a disclaimer nor splash screen, it models the type of functionality that Plaintiffs are suggesting:

<http://www.aaafoundation.org/home/> .



1 Third, Plaintiffs propose that the Court permanently enjoin Defendants from  
 2 engaging in deceptive marketing or placing misleading statements on DMV.org to  
 3 address the *specific* currently deceptive practices taking place, as discussed *supra* and  
 4 *infra*.

5 **B. Why, as Suggested by the Ninth Circuit, The Court Should Also**  
 6 **Permanently Enjoin Defendants From Engaging in Deceptive**  
 7 **Marketing or Placing Misleading Statements on DMV.org. And Not,**  
 8 ***Alternatively Do So***

9 Contrary to Defendants' contention, the Ninth Circuit's Mandate did not invite  
 10 the Court to simply draft an injunction that states that defendants are permanently  
 11 enjoined from "engaging in deceptive marketing or placing misleading statements on  
 12 DMV.org." This incorrect interpretation of the Mandate would lead to a broad and  
 13 almost meaningless remedy; one that fails to be narrowly tailored and which would  
 14 open the door to further contempt motions every six months, possibly new lawsuits, and  
 15 a waste of judicial resources. Indeed, the Ninth Circuit specifically instructed to "*See*  
 16 *U-Haul II*, 793 F.2d at 1043 (modifying injunction to prohibit only false or misleading  
 17 advertising)."

18 The reference to *U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034,  
 19 1042-1043 (9th 1986), clarifies the Ninth's intent, which was not to instruct the Court  
 20 to issue a one line vague and overbroad injunction. The revised *U-Haul II* injunction  
 21 was anything but that. In line with the First Amendment concern that a false advertising  
 22 remedy should go no further in imposing a restraint on commercial speech than is  
 23 reasonably necessary to accomplish the remedial objective of preventing false  
 24 advertising, the Ninth Circuit held in *U-Haul II* that an injunction against false  
 25 comparative advertising which seemed also to prohibit potential truthful comparative  
 26 advertising raised commercial free speech problems and must be narrowed in scope.  
 27 The Ninth Circuit stated:



1 “As currently written, the injunction seems to prohibit future  
 2 comparative advertising even if it is truthful. We are mindful  
 3 of our obligation to prevent Jartran from misleading the  
 4 public in the future with its deceptive ads. But we can fulfill  
 5 that obligation while protecting Jartran's First Amendment  
 6 rights -- and simultaneously increase the "informed and  
 7 reliable decision making" that honest advertising can  
 8 provide. [citations omitted.] We therefore modify the  
 9 injunction as follows: [<sup>9</sup>]

10 IT IS ORDERED that defendant JARTRAN, INC., its  
 11 officers, agents, servants, employees, consultants and all  
 12 those persons in active concern or participation with them,  
 13 be and they are hereby permanently enjoined and restrained  
 14 from publishing or otherwise disseminating any  
 15 advertisement or media press release, that:

- 16 (1) [Purports to state] *Falsely or deceptively states* both  
 17 the prices charged by U-Haul and those charged by  
 18 Jartran and/or *falsely or deceptively states* that Jartran  
 19 saves consumers money by reason of the prices  
 20 charged by Jartran while mentioning, displaying, or  
 21 otherwise directly referring to U-Haul or any of its  
 22 equipment;
- 23 (2) *Falsely or deceptively* represents, either expressly or  
 24 impliedly, that Jartran trucks or trailers are safer than  
 25 all U-Haul trucks or trailers;
- 26 (3) *Falsely or deceptively* represents, either expressly or  
 27 impliedly, that Jartran trucks or trailers are more  
 28 stable than all U-Haul trucks or trailers;
- (4) *Falsely or deceptively* represents, either expressly or  
 impliedly, that Jartran trucks are more fuel efficient  
 than all U-Haul trucks; or

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<sup>9</sup> “n7 Additions are italicized, deletions are bracketed.”

(5) *Falsely or deceptively* represents, either expressly or impliedly, that Jartran equipment is in any manner better designed than all U-Haul equipment.”

*U-Haul II*, 793 F.2d at 1042-43.

Accordingly, the proper interpretation of the Mandate is not as Defendants suggest—a broad unworkable injunction— but a narrowly tailored one in the format of *U-Haul II*.

**V. THE SPECIFIC CONDITIONS THAT THE COURT SHOULD ORDER DEFENDANTS TO SATISFY IN ORDER TO REMOVE THE SPLASH SCREEN IN THE FUTURE THAT ARE IN LINE WITH THE NINTH CIRCUIT OPINION**

Plaintiffs acknowledge that the Ninth Circuit has stated that the Court must specify the conditions that Defendants should satisfy in order to remove the splash screen in the future. However, Plaintiffs submit that those conditions are best determined after the Court evaluates all of the relevant new evidence and allows the parties to respectively brief the issue based on the new evidence.

Alternatively, Plaintiffs first propose that in order to justify any removal of the splash screen in the future, Defendants would need to change their inherently misleading domain name and redirect all visitors to DMV.Org to a newly non-deceptive domain (e.g., UnofficialGuideToDMV.com). A legal scholar following this case has also made this argument. See, Hamilton Decl., Ex. Y).

Plaintiffs’ also propose that the Court borrow from the Federal Trade Commission (FTC), which has developed laws and disclosure guidelines that are directly analogous to the First Amendment rule of the “least restrictive alternative” remedy for commercial speech, and thus would satisfy the Ninth Circuit’s First Amendment concerns. As Professor McCarthy states:

“It is the in the remedy phase that First Amendment concerns appear to have their greatest impact in the false advertising

context. That is, in determining the terms and scope of an injunction, free speech policies must be considered. The traditional First Amendment rule of the “least restrictive alternative” is that court orders must be written in the narrowest possible terms which focus upon the exact remedial objective to be accomplished.[ ] There is also a direct analogy in Federal Trade Commission (FTC) proceedings. For almost fifty years, the Supreme Court followed a rule of interpretation that less restrictive alternatives must be investigated and rejected before the FTC could adopt a remedy against false advertising that required the excision of a trademark. [citations omitted.] Whether this rule of FTC procedure has now become one of Constitutional statute is not clear from Supreme Court interpretations.[citations omitted.] However, the Court had indicated that the least restrictive alternative rule does to some extent apply to the commercial speech context, the Court observing that the First Amendment mandates that speech restrictions be “narrowly drawn” and not “completely suppress information when narrower restrictions on expression would serve a legitimate interest as well.” 4 McCarthy on Trademarks and Unfair Competition § 27:69 (4th ed.)

Accordingly, Plaintiffs attach as Exhibit AA to the Hamilton Decl. the FTC guidelines; See also, Tushnet, Ex. Y.

In addition, or alternatively, Plaintiffs propose that the Court appoint a Special Master to oversee and independently evaluate the continued need for the splash screen on a periodic basis.

**VI. THE COURT’S PROPOSED NEXT STEP(S): SETTING A STATUS CONFERENCE, ISSUING AN ORDER REQUESTING ADDITIONAL BRIEFING, OR ISSUING A MODIFIED PERMANENT INJUNCTION**

In light of the all of the above considerations, Plaintiffs welcome a status conference with the Court, including setting the scope and procedures for evidence gathering and evaluation. Plaintiffs also are prepared to provide the Court with additional briefing as to the First Amendment, FTC procedures, or any other issues. Plaintiffs are also open to participating in a Court ordered settlement conference. However, Plaintiffs’ are emphatic that no modified permanent injunction should be issued based solely on self-serving and unchallenged declarations or other evidence submitted by Defendants who have already been found to be willful false advertisers and as illustrated above, are continuing to engage in deceptive practices.

## DEFENDANTS' PORTION OF JOINT STATUS REPORT

### I. INTRODUCTION

The permanent injunction entered by this Court over three years ago is operating as an impermissible prior restraint on free speech and must be dissolved or modified in light of significantly changed circumstances. Critically, any and all past deceptive conduct for which the Court entered its permanent injunction has been cured by Defendants. The permanent injunction's requirement for a splash screen barrier is unjustified and unnecessarily burdensome for at least three reasons:

- A restraint is being imposed on informational content that is fully protected under the First Amendment;
- A restraint is being imposed on truthful commercial speech, which is entitled to significant First Amendment protection; and
- Defendants no longer engage in any marketing practices that the Court found deceptive nor does the site contain any false or misleading statements.

Defendants own or manage<sup>1</sup> the website <http://www.dmv.org/> ("dmv.org") an internet publishing platform that provides Constitutionally-protected information regarding driver-related tasks and vehicle services.<sup>2</sup> Visitors to the site can perform research and read articles on a number of subjects as identified by the Ninth Circuit, as well as highly popular "How-To" Guides, how to easily register as a voter, how to apply for and obtain a passport, and otherwise gain invaluable information.<sup>3</sup> Defendants earn revenues through receiving referral fees from third parties, and selling sponsored links.

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<sup>1</sup> For the precise relationships between Defendants and in relation to dmv.org, see Doc. No. 210 at 2:25-3:10.

<sup>2</sup> See <http://www.dmv.org/> (last visited September 6, 2011) and Declaration of Raj Lahoti ("Lahoti Decl.") ¶ 2, Exhibit A (screen shot of dmv.org's current home page).

<sup>3</sup> *Id.*

Following this Court's issuance of a permanent injunction, Defendants discontinued all the marketing practices that the Court found problematic. Moreover, the content of dmv.org has evolved, and the site design has been dramatically overhauled, such that the Court's initial concerns have been entirely alleviated. There are now numerous embedded design elements to the site that explicitly and implicitly disclaim any government affiliation, including the very first line of each and every web page on dmv.org – at the top – which states unambiguously: **“DMV.org is a privately owned website that is not owned or operated by any government agency.”** These design changes are discussed and shown in further detail below. Furthermore, the “splash screen” ordered by the Court has been in place for over three years – more than sufficient amount of time to dissipate any public and consumer confusion caused by Defendants' formerly deceptive conduct. Finally, in multiple ways, Defendants have voluntarily warned consumers not to transmit sensitive information to dmv.org, including in three spots on dmv.org's contact form.<sup>4</sup>

Accordingly, Defendants respectfully request that the Court dissolve or modify the previously entered permanent injunction as follows:

- The requirement for an “acknowledgment splash screen” be removed;
- Dmv.org shall utilize visible design elements on the website that disclaim its affiliation with any government agency;
- Defendants should be permanently enjoined from engaging in deceptive marketing or placing misleading statements on dmv.org,<sup>5</sup> and
- Any alleged violations of the Court's permanent injunction shall be subject to a 30-day notification-and-cure period.

A redlined and clean copy of Defendants' [Proposed] Permanent Injunction has

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<sup>4</sup> Lahoti Decl. ¶ 6, Exhibit E (screen shot of dmv.org's current contact form).

<sup>5</sup> This last point is an approach suggested by the Ninth Circuit. *See* Declaration of Andrew Serwin (“Serwin Decl.”), Ex. A at \*7.

1 been submitted by Defendants.<sup>6</sup> Should the Court continue to require a splash  
 2 screen, Defendants request: (1) an explanation for the splash screen's continued  
 3 justification for burdening the website's protected content and what conditions  
 4 Defendants may satisfy in order to remove the splash screen in the future, and (2)  
 5 an opportunity to present new evidence and/or satisfy the Court's conditions for  
 6 removing the splash screen.<sup>7</sup>

## 7 **II. PROCEDURAL STATUS**

8 On August 26, 2008, the District Court for the Central District of California  
 9 entered its judgment and permanent injunction in the above captioned matter.<sup>8</sup>  
 10 Cross-appeals to the Ninth Circuit Court of Appeals ensued and resulted in a Ninth  
 11 Circuit published opinion issued on July 28, 2011.<sup>9</sup>

12 On August 23, 2011, the Ninth Circuit filed its mandate with instructions for  
 13 the District Court to reconsider the scope and terms of the permanent injunction.

14 On August 24, 2011, this Court ordered the parties to meet and confer  
 15 regarding the modification of the permanent injunction, and also, to file a joint  
 16 status report by September 6, 2011, setting forth the parties' respective positions  
 17 concerning their proposals for how, consistent with the Ninth Circuit's Opinion,  
 18 the Court should modify the permanent injunction and what, if any, additional  
 19 factual findings the Court should rely on in modifying the permanent injunction.

## 20 **III. SUMMARY OF PARTIES' MEET AND CONFER<sup>10</sup>**

21 On September 1, 2011, counsel for the parties met and conferred  
 22 telephonically, with their respective clients in attendance telephonically. Counsel  
 23

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24 <sup>6</sup> Serwin Decl. ¶ 3, Exhibits B and C.

25 <sup>7</sup> See *TrafficSchool.com, Inc.*, 2011 WL 3198226, at \*7.

26 <sup>8</sup> Exhibit D to Serwin Decl.

27 <sup>9</sup> *TrafficSchool.com, Inc. v. Edriver Inc.*, --- F.3d ----, 2011 WL 3198226 (9th Cir.  
 July 28, 2011), attached as Exhibit A to Serwin Decl.

28 <sup>10</sup> Serwin Decl. ¶ 5.



1 for Defendants, Andrew Serwin, presented Defendants' proposal for how the  
2 permanent injunction should be modified, in substantially the same form as is  
3 being requested from this Court. Plaintiffs' position was that the permanent  
4 injunction should not be modified in any form until Plaintiffs were provided with  
5 evidence that the permanent injunction was not needed. Counsel for Plaintiffs  
6 suggested setting a schedule for conducting written discovery and taking  
7 depositions, relating to any lingering "confusion" in the marketplace.

8 Counsel for Defendants responded that (1) any formerly problematic  
9 practices had been discontinued; (2) evidence of "confusion" stemming from the  
10 website could not be viewed in a vacuum apart from allegedly deceptive conduct;  
11 and (3) existing consumer confusion is not a result of deceptive conduct. Counsel  
12 for Defendants further expressed that Plaintiffs appeared to be completely ignoring  
13 the restrictive effects that the splash screen imposes on First Amendment protected  
14 speech, and that the Ninth Circuit's suggested injunction to enjoin Defendants  
15 from engaging in deceptive marketing or placing misleading statements on  
16 dmv.org would fully resolve any of Plaintiffs' and the District Court's concerns –  
17 without additional fact finding and discovery. However, counsel for Defendants  
18 agreed to review a written proposal for a discovery schedule and respond as  
19 quickly as possible.

20 Between September 2-6, 2011, Plaintiffs and Defendants exchanged meet  
21 and confer correspondence relating to permanent injunction and discovery issues.<sup>11</sup>  
22 Plaintiffs' arguments, which are nothing more than a distraction from the real  
23 issues, can be boiled down as follows: (1) that Defendants' implementation and  
24 optimization efforts of the splash screen is deceptive; and (2) that Defendants are  
25 improperly deleting comments from dmv.org's Facebook page. On the first point,  
26 Defendants responded that the splash screen fully complies with the Court's order

27  
28 <sup>11</sup> Serwin Decl. ¶¶ 6-9, Exs. E-H.

1 and the issue has already been adjudicated. On the second point, Defendants  
 2 responded that dmv.org remove inappropriate comments from its Facebook page  
 3 for a variety of reasons, including that the comments are disparaging or offensive,  
 4 or that leaving the comments up would actually *perpetuate* consumer confusion.<sup>12</sup>

#### 5 **IV. STATEMENT OF NINTH CIRCUIT’S DECISION**

6 Relevant to the permanent injunction issued by this Court, the Ninth Circuit  
 7 Court of Appeals discussed as follows:

8 • Information provided by Defendants on the website dmv.org “seems . . .  
 9 legitimate and useful . . . , except that some visitors mistakenly believe the site is  
 10 run by their state’s department of motor vehicles (DMV).” *TrafficSchool.com,*  
 11 *Inc.*, 2011 WL 3198226, at \*1.

12 • The district court reasoned that the splash screen was necessary to: (1)  
 13 ‘remedy any confusion that consumers have already developed before visiting  
 14 DMV.ORG for the first time,’ (2) “remedy the public interest concerns associated  
 15 with [confused visitors'] transfer of sensitive information to Defendants,” and (3)  
 16 “prevent confusion among DMV.ORG's consumers.” *Id.* at \*6. As will be  
 17 discussed in detail below, all of these concerns have been remedied by Defendants.

18 • “Some of the website's content is informational and thus fully protected,  
 19 such as guides to applying for a driver's license, buying insurance and beating  
 20 traffic tickets.” *Id.*

21 • “The district court does not appear to have considered that its injunction  
 22 would permanently and unnecessarily burden access to DMV.org's First  
 23 Amendment-protected content. The splash screen forces potential visitors to take  
 24 an additional navigational step, deterring some consumers from entering the  
 25 website altogether. It also precludes defendants from tailoring Dmv.org's landing  
 26 page to make it welcoming to visitors, and interferes with the operation of search

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27 <sup>12</sup> Lahoti Decl. ¶¶ 8-9.  
 28

engines, making it more difficult for consumers to find the website and its protected content. All of these burdens on protected speech are, under the current injunction, permanent.” *Id.* at \*7 (internal footnotes omitted).

- “[W]ebsite content and advertising practices can and do change over time. Indeed, the court found that defendants had already ‘made some changes to DMV.ORG and how they marketed it.’” *Id.*

- “On remand, the district court shall reconsider the duration of the splash screen in light of any intervening changes in the website’s content and marketing practices, as well as the dissipation of the deception resulting from past practices. If the district court continues to require the splash screen, it shall explain the continuing justification for burdening the website’s protected content and what conditions defendants must satisfy in order to remove the splash screen in the future.” *Id.*

## **V. THE PERMANENT INJUNCTION MUST BE MODIFIED**

### **A. Legal Standards**

A district court is authorized to relieve a party from final judgment where it is no longer equitable that the judgment have a prospective operation. Fed. R. Civ. P. 60(b)(5); *Rufo v. inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (discussing changed circumstance as basis to modify a judgment); *Lapin v. Shulton, Inc.*, 333 F.2d 169, 170 (9th Cir. 1964) (“It is clear that the issuing court has continuing jurisdiction to modify or revoke an injunction as changed circumstances may dictate.”).

An injunction must burden no more protected speech than necessary. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1016-14 (9th Cir. 2004). An injunction operates as an unconstitutional prior restraint when individuals are enjoined from engaging in lawful speech that they have conducted in a lawful manner in the past. *See Lawson v. Murray*, 515 U.S. 1110, 1111 (1995) (Scalia, J., concurring); *see*

1 *also New.Net, Inc. v. Lavasoft*, 356 F.Supp.2d 1071, 1083-84 (C.D. Cal. 2003)  
 2 (analyzing and summarizing different forms of “speech” and finding that requested  
 3 injunction would be an impermissible prior restraint). Prior restraints are the most  
 4 serious and least tolerable infringements on First Amendment rights. *Nebraska*  
 5 *Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Such restraints bear a “heavy  
 6 presumption” against their constitutionality. *Forsyth County v. Nationalist*  
 7 *Movement*, 505 U.S. 123, 130 (1992).

8 Informational articles that “serve a commercial purpose” but yet contain  
 9 “expressive elements” are afforded full First Amendment protection. *Mattel Inc. v.*  
 10 *MCA Records, Inc.*, 296 F.3d 894, 906-07 (9th Cir. 2002) (“If speech is not ‘purely  
 11 commercial’—that is, if it does more than propose a commercial transaction—then  
 12 it is entitled to full First Amendment protection.”); *Hoffman v. Capital Cities/ABC,*  
 13 *Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001). Truthful commercial speech is entitled  
 14 to significant First Amendment protection. *See Cent. Hudson Gas & Elec. Corp. v.*  
 15 *Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980). In the event that lingering  
 16 confusion from past deception has dissipated, or a less burdensome alternative  
 17 method is available as a remedy, then a splash screen’s burden on protected  
 18 content is unjustified. *TrafficSchool.com, Inc.*, 2011 WL 3198226, at \*6-7.

19 **B. The Court Should Consider The Significant Interim Changes**  
 20 **Made to Dmv.org and Narrowly Tailor the Injunction to Enjoin**  
 21 **Only False or Deceptive Statements**

22 The currently imposed injunction for a splash screen “barrier” is  
 23 undoubtedly burdening “more protected speech than necessary.” As the  
 24 undisputed evidence in the record indicates, splash screens drive away up to 25%  
 25 of potential site visitors.<sup>13</sup> Moreover, the splash screen barrier interferes with  
 26

27  
 28 <sup>13</sup> It should be noted that the lost site visits and referrals have slashed Defendants’  
 operating revenues by an equal or greater magnitude.

Defendants’ ability to engage in free speech as well as the public’s ability to receive information on dmv.org.<sup>14</sup> A less burdensome remedy – one that does not operate as a prior restraint on speech – will allow for a free exchange of information, solve the Court’s concerns regarding deception, and permit more consumers to find and access a host of valuable services.

This Court should consider the overhauled marketing strategy and design element changes in dissolving and/or modifying the permanent injunction. In 2008, Defendants discontinued the search engine marketing practices that the Court found problematic. For example, a user who inputs “California DMV” into a Google search sees dmv.org as the third natural listing, with the text – “California DMV Guides and How-To’s – DMV.org: The Unofficial DMV Guide.”<sup>15</sup> Moreover, the content, design and “look and feel” of dmv.org are completely different.

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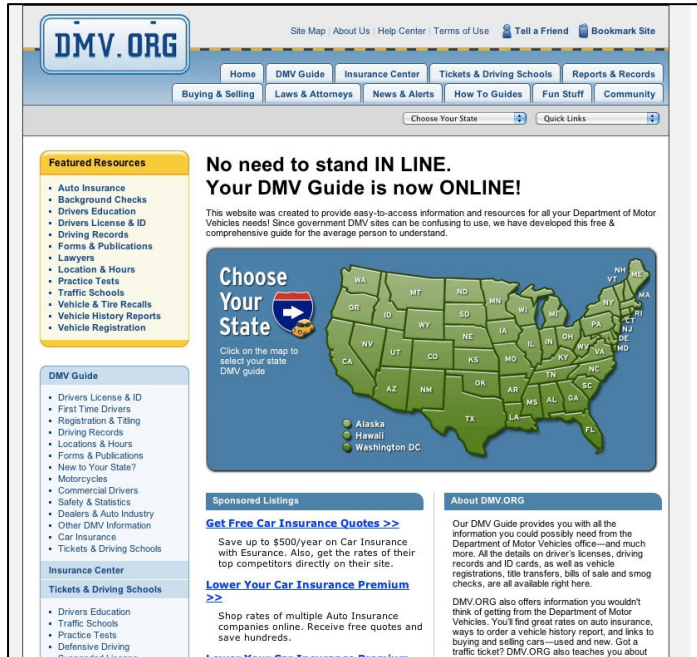
///

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<sup>14</sup> It is un rebutted in the record that splash screens interfere with search engines’ functionalities and therefore, the ability for both Defendants and the public to exchange information.

<sup>15</sup> Lahoti Decl. ¶ 4, Exhibit C (Google screenshot as of Sept. 1, 2011).



**“Before”  
screen shot –  
dmv.org’s  
previous  
home page  
design**

**Clearly visible  
disclaimer**

**Added to site**

**New logo**



**“After”  
screen  
shot –  
Dmv.org’s  
current  
home page  
design,  
after  
clicking  
through  
splash  
screen**



The following table sets forth potential concerns the Court had in entering its injunction, and subsequent changes in Defendants' practices to remedy each concern.

	POTENTIAL CONCERNS REGARDING DECEPTION	CHANGES ALREADY IMPLEMENTED BY DEFENDANTS
1.	Visitors to DMV.ORG may mistakenly think that the website was their state's Department of Motor Vehicle's official site. <sup>16</sup>	<p><b><u>At least five (5) major design changes:</u></b></p> <ol style="list-style-type: none"> <li>1. Disclaimer is the very first line of each and every web page on dmv.org – at the top: <b>“DMV.org is a privately owned website that is not owned or operated by any government agency.”</b></li> <li>2. Website features new design colors, layout, cartoon logo, and slogans</li> <li>3. Added to Site: “The Unofficial DMV Guide, Since 1999”</li> <li>4. Displayed in header: section entitled “About Our Company”</li> <li>5. Ran a 99designs.com redesign contest with specific instructions that the website should not look anything like a government site.<sup>17</sup></li> </ol>
2.	Sponsored Listings were potentially deceptive	<ol style="list-style-type: none"> <li>1. Practices identified by Court were <b><u>discontinued</u></b></li> <li>2. See design changes above</li> </ol>
3.	DMV.ORG's use of official slogans and state symbols were potentially deceptive	<ol style="list-style-type: none"> <li>1. Website <u>no longer uses</u> any state symbols or slogans</li> <li>2. Prominent disclaimer on top of pages</li> </ol>

<sup>16</sup> Only 22 states actually have an agency termed “DMV” or “Department of Motor Vehicles.” Thus, confusion could only exist for visitors to the site residing in these 22 states, whereas DMV.ORG provides content covering all 50 states.

<sup>17</sup> See Lahoti Decl. ¶ 5, Exhibit D (screen shot of redesign contest with instructions).

	POTENTIAL CONCERNS REGARDING DECEPTION	CHANGES ALREADY IMPLEMENTED BY DEFENDANTS
		<p>3. Added: "The Unofficial Guide to DMV since 1999"</p> <p>4. See other design changes above</p>
4.	Disclaimer was easy to miss because of location at bottom of the site	<p>1. Disclaimer is the very first line of each and every web page on dmv.org – at the top: <b>"DMV.org is a privately owned website that is not owned or operated by any government agency."</b></p> <p>2. See other design changes above</p>
5.	Potentially deceptive site was causing visitors to transmit personal information to dmv.org	<p>1. Disclaimer is the very first line of each and every web page on dmv.org – at the top: <b>"DMV.org is a privately owned website that is not owned or operated by any government agency."</b></p> <p>2. There is only one avenue for visitors to contact dmv.org, and right above the text box where visitors are advised to "Please provide details," it is stated in bold caps: <b>"DO NOT PROVIDE ANY SENSITIVE INFORMATION"</b></p> <p>3. See Lahoti Decl. ¶ 6, Exhibit E (screen shot of current contact form).</p> <p>4. See other design changes above</p>
6.	Cities, law firms, and newspapers were mistakenly linking to dmv.org	<p>1. Disclaimer is the very first line of each and every web page on dmv.org – at the top: <b>"DMV.org is a privately owned website that is not owned or operated by any government agency."</b></p> <p>2. See other design changes above</p>

	POTENTIAL CONCERNS REGARDING DECEPTION	CHANGES ALREADY IMPLEMENTED BY DEFENDANTS
7.	Combination of dmv.org URL, design, and Search Engine Marketing (“SEM”) strategy was potentially deceptive	1. Defendants have changed the SEM strategy and overhauled website design 2. See design changes above and screen shots
8.	Referrals to third party vendors contained “Recommended” language with official DMV look was potentially deceptive	1. Practices identified by Court were <b><u>discontinued</u></b> 2. See other design changes above
9.	Metatags, title tags, and descriptions were potentially deceptive	1. All metatags and title tags have been updated and resolved – see “after” screen shot and current website design 2. SEM Strategy has been changed

The Court’s permanent injunction can and should be more narrowly tailored to prevent deceptive statements, but not impose an unnecessary burden on protected speech. To reiterate, first, the splash screen and changed marketing practices have been in place for over three years, dissipating any lingering confusion that may have existed in the marketplace caused by deceptive conduct. Second, all visitors to the site are now immediately and repeatedly confronted with at least five major re-design elements, not the least of which is an explicit disclaimer that **“DMV.org is a privately owned website that is not owned or operated by any government agency.”** Third, visitors are warned in at least three different ways not to transmit sensitive information to dmv.org. In light of the changed circumstances, the full First Amendment protection afforded to the site’s informational content, and the goodwill demonstrated by Defendants in complying with the Court’s orders and instructions, the previously imposed requirement for a splash screen should be lifted.

1 In response to Plaintiffs' claimed concerns regarding lingering public  
 2 "confusion" regarding dmV.org's affiliations, Defendants respond that "confusion"  
 3 devoid of a connection to any ongoing deceptive conduct cannot and does not  
 4 merit the imposition of a prior restraint on fully protected informational content  
 5 and truthful commercial speech. Plaintiffs have not come forward with any  
 6 evidence that Defendants have and are continuing with deceptive marketing or  
 7 misleading statements. Indeed, they make two distracting arguments regarding (1)  
 8 the implementation of the splash screen as evidence of deception and (2) alleged  
 9 improper deletions of Facebook comments. For the reasons discussed above under  
 10 "Summary of Parties' Meet and Confer," these arguments have no merit.  
 11 Consequently, Defendants' calls for further discovery are wasteful and  
 12 unnecessary.

13 In the event the Court determines that further discovery is necessary,  
 14 Defendants reserve the right to seek reciprocal discovery, as well as discovery  
 15 relating to the relative level of "consumer confusion" with respect to other  
 16 commercial websites, including but not limited to, websites operated by Plaintiffs,  
 17 and their use of certain terms that may imply "official" status.

### 18 **C. Conclusion**

19 The marketing and content of dmV.org has significantly changed and all of  
 20 the Court's concerns have been remedied. As such, the previously entered  
 21 permanent injunction is unnecessarily burdening and restricting protected free  
 22 speech. Defendants' [Proposed] Permanent Injunction should be entered as  
 23 follows:

- 24 • The requirement for an "acknowledgment splash screen" is removed;
- 25 • DmV.org shall utilize visible design elements on the website that
- 26 disclaim its affiliation with any government agency;
- 27 • Defendants should be permanently enjoined from engaging in
- 28 deceptive marketing or placing misleading statements on dmV.org, and

- Any alleged violations of the Court's permanent injunction shall be subject to a 30-day notification-and-cure period.

Dated: September 6, 2011

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